

NO. 87-73

Supreme Court, U.S.  
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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

KATHERINE B. NICHOLS, ETC.,  
Petitioners,  
v.

DON RYSAVY, ET AL.,  
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT  
STATE OF SOUTH DAKOTA

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## QUESTIONS PRESENTED

1. Whether the United States is an indispensable party to an action pursuant to 25 U.S.C. S 345?
2. Whether the Secretary of the Interior, pursuant to the authority granted to him by the Burke Act, erred when he (1) issued patents in fee to Indians without their application or (2) incorporated a blood quantum standard in determining competency and in determining whether to issue patents in fee to Indians?
3. Whether, assuming the Secretary erred in issuing patents in fee without application or erred in utilization of the blood quantum standard, the patents in fee so issued were void or merely voidable; whether, assuming such patents in fee were void, the pertinent statutes of limitations nonetheless ran?
4. Whether 28 U.S.C. S 2401(a) or 25 U.S.C. S 347 provides authority to bar these actions at this date?

(i)

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BRIEF IN OPPOSITION OF RESPONDENT  
STATE OF SOUTH DAKOTA

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SUMMARY OF ARGUMENT

State of South Dakota argues herein that  
the Secretary of the Interior's 1917 policy

of issuing fee patents to allottees without application was a valid exercise of his authority pursuant to the 1906 Burke Act. 25 U.S.C. § 349. Neither the plain language of the statute nor its legislative history in light of the contemporary context and contemporaneous statutes support the contention that an application was required.

Allottees received their allotments subject to the authority of the Secretary to terminate the trust relationship by issuing a fee patent. The 1917 Declaration of Policy was an appropriate exercise of that authority. Further, the Secretary did make a constitutionally valid determination of competency in these cases. The fee patents issued in these cases are not void.

The State contends that 25 U.S.C. § 345 does not constitute a waiver of the sovereign immunity of the United States. These cases are not ones for an allotment. Even if § 345

gives consent to sue, however, 28 U.S.C. S 2401(a) would bar the claim against the United States. The United States is an indispensable party under Fed.R.Civ.P. 19(b); because it cannot be joined, the entire action should be dismissed. The State respectfully submits that the petition should be denied.

#### REASONS FOR DENYING THE PETITION

##### I

THE COURT OF APPEALS CORRECTLY FOUND THE FEE PATENTS VALID.

Some 65-70 years ago, the Secretary of the Interior, pursuant to the authority of the Burke Act, 25 U.S.C. S 349, issued some 10,000 fee patents to able-bodied Indian allottees over 21 years of age without application, based upon the quantum of Indian blood each person possessed. These patents became known as forced fee patents. The results of this policy later appeared less

than satisfactory, and in 1966 Congress set in motion a process for identifying a wide variety of potential land claims. The forced fee patent lands were included in a listing of potential Indian claims by the Department of the Interior in 1983. 48 Fed. Reg. 51204-51268 (Nov. 7, 1983); 48 Fed. Reg. 13697-13920 (Mar. 31, 1983).

The United States declined to litigate the forced fee patent claims. However, the results of the publication of the potential claims and subsequent litigation were far reaching.

Thus, these forced fee patent claims have far reaching social, economic, and political ramifications. . . . Title to millions of acres of land is clouded, thus affecting real estate transactions, probate proceedings, and credit availability. In other words, thousands of landowners are effectively barred from selling their land.

Another ramification involves the validity of a fee patent issued by the U.S. Government. If these

fee patents can be successfully attacked, the entire United States title system is in jeopardy.

Nichols v. Rysavy, 610 F.Supp. 1245, 1254 (D.S.D. 1985).

The holdings below remove that unwarranted cloud on the title to lands held by third parties pursuant to fee patents which were unquestioned for some 60 years. That the 1917 Declaration of Policy may be seen in an historical setting to be unwise, does not translate into a legal conclusion that it was illegal.

Contrary to Petitioners' claims, the holdings below neither validate illegal governmental action nor devastate the ability of Indians to protect their trust interests. What the Court of Appeals affirmed was that the federal government had the authority to issue the fee patents and that the lands in question were no longer trust lands.

Petitioners seek to call into question the validity of thousands of fee patents issued by the United States and justifiably relied upon by innocent third parties. The courts below appropriately determined that these actions could not in equity and good conscience, proceed in the absence of the United States.

Furthermore, the Petitioners are not without a forum before which to assert their claims against the United States. They can ask Congress for a resolution of such claims. That political forum is the appropriate place to deal with a federal policy that produced unsatisfactory results.

## II

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE UNITED STATES WAS AN INDISPENSABLE PARTY.

- A. The determination of indispensability is consistent with prior decisions of this Court.

The Court of Appeals found that the United States was an indispensable party, in whose absence the actions should not be allowed to proceed. Petitioners do not dispute that the Court of Appeals applied the proper test in making that determination by utilizing the method prescribed by this Court in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). Rather, Petitioners claim that the Courts' application of the four part test set out in Rule 19(b) and elucidated in Provident Tradesmens, is somehow inconsistent with this Court's decisions in Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968) and Hodel v. Irving, \_\_\_\_ U.S. \_\_\_, 107 S.Ct. 2076 (1987). Both cases are inapposite.

Poafpybitty was an action by allottees claiming a breach of an oil and gas lease. The lands in question were undisputedly trust lands, and there were no allegations of

impropriety or wrong doing by the United States. In short, the interests of the allottees and those of the federal government were not adverse or incompatible. The Court held that the allottees had standing to sue to protect their allotments, notwithstanding that the United States could also have brought such an action. There was simply no question before the Court in Poafpybitty as to whether the United States was an indispensable party.

Similarly, Hodel v. Irving involved a question of standing, not indispensability. The question was whether Indian heirs had standing to challenge the constitutionality of a federal statute which deprived them of fractional interests in trust property, by depriving their descendants to the right to pass the property at death. This Court held that the heirs had standing. There was no question before the Court as to whether the

United States was a proper party to the action.

In these cases, on the other hand, the crux of the dispute is whether the United States can be forced to reassume a trust with regard to property now held by third parties pursuant to fee patents. If a fee patent is voidable, it may only be set aside, if at all, in a direct action commenced by the United States. In Re Emblen, 161 U.S. 52 (1896). Booth-Kelley Lumber Co. v. United States, 237 U.S. 481 (1915). Collateral attacks by third parties are not permissible. St. Louis Smelting and Refining Co. v. Kemp, 104 U.S. (14 Otto) 636 (1882).

Petitioners seek to have lands currently held by thousands of non-Indians, pursuant to transfers deriving from a fee patent issued by the United States, returned to federal ownership and trust status. Petitioners claim that this should be done because of

allegedly illegal or constitutionally deficient activities undertaken by the Department of the Interior some 65 to 70 years ago. Petitioners seek not only damages from the United States, but also seek to have the federal government cancel long-standing fee patents, and take the property back into trust status, with the concomitant resumption of fiduciary responsibilities. Petitioners claim this can be accomplished without the United States as a party to the proceedings.

It is evident that Petitioners' claims are all based upon the assumption that the United States illegally issued fee patents to Petitioners' ancestors and still holds title to the land. Indeed the claims against the non-federal Respondents of trespass, wrongful possession, ejectment, and rents and profits all involve the question of which party is the owner of the real property in question.

Those issues need only be reached if Petitioners' claims against the United States are valid.

This is simply not an instance where the Petitioners and the United States share compatible goals as was true in Heckman v. United States, 224 U.S. 413 (1912) or in Poafpybitty. In fact the United States denies that it acted improperly in issuing the fee patents now under attack. These cases question whether the United States holds title to the property in trust. The prior decisions of this Court establish that the United States is indispensable to such a determination. See Minnesota v. United States, 305 U.S. 382 (1939); McKay v. Kalyton, 204 U.S. 458 (1907).

The Court of Appeals appropriately balanced the interests of the respective parties in making its determination of indispensability. The thrust of Petitioners'

assertion is that the Court of Appeals abused its discretion in weighing those respective interests. However, the determination made is not inconsistent with prior decisions of this Court, and is in fact supported by the relevant prior decisions.

B. The United States is indispensable under 25 U.S.C. § 345.

Petitioners also assert that 25 U.S.C. § 345 indicates that the United States is not indispensable, relying on the Court's recent decision in United States v. Mottaz, 476 U.S. \_\_\_, 106 S.Ct. 2224 (1986). Petitioners, quite simply, misread this decision:

Section 345 thus contemplates two types of suits involving allotments: suits seeking the issuance of an allotment, . . . and suits involving "'the interests and rights of the Indian in his allotment or patent after he has acquired it. . . .'"

The structure of § 345 strongly suggests, however, that § 345 itself waives the Government's

immunity only with respect to the former class of cases: those seeking an original allotment.

United States v. Mottaz, 106 S.Ct. 2224, 2231 (1986). Petitioners do not seek "the issuance of an allotment"; therefore, the United States has not by 25 U.S.C. § 345 waived its immunity.

The Court of Appeals, however, found it unnecessary to reach the issue, assuming arguendo that the property in question met the allotment definition, and going on to decide that 28 U.S.C. § 2401(a) barred the action against the United States. What Petitioners urge here is that footnote 9 of the Mottaz decision indicates that the United States is never an indispensable party when the suit is one for other than an original allotment. However, footnote 9 only states that the United States might not be a proper party "in many private disputes that relate to land claims originally granted by various

allotment acts." Mottaz, 106 S.Ct. at 2231, n.9.

While Mottaz clearly limited the scope of S 345, the underlying principle discussed in McKay v. Kalyton, 204 U.S. 458, 469 (1907), remains applicable to the situation before the Court. Thus, when land is held in trust, or when the issue before the court is (as it is here) whether the title is held in trust by the United States, then the United States is clearly a "proper party" and, moreover, the issue of the ownership of such property is not a mere "private dispute." The issue is, instead, one which concerns the "harmonious and uniform operation of the legislation of Congress." 204 U.S. at 469.

Further, nothing in Mottaz indicates that the language of S 345 obviates the need for careful application of the four part test in Rule 19(b). On the contrary, Mottaz supports the application of the factors

discussed in Provident Tradesmens, especially in those cases where the action is not one seeking the issuance of an allotment.

The determination that the United States is an indispensable party was a correct one, and is consistent with prior decisions of this Court. To assert that it is inconsistent with a policy of protecting allotments is to beg the question. The issue is whether there is an allotment. The United States is an indispensable party to the determination of that issue.

### III

THE SECRETARY OF THE INTERIOR, PURSUANT TO THE BURKE ACT, COULD PROPERLY ISSUE PATENTS IN FEE TO INDIANS WITHOUT THEIR APPLICATION; THE SECRETARY OF THE INTERIOR DID, IN FACT, MAKE INDIVIDUAL DETERMINATION OF COMPETENCY BEFORE GRANTING THE FEE APPLICATIONS IN EACH CASE BEFORE THIS COURT.

The Petitioners argue that (1) the Burke Act required the Secretary of the Interior to have in hand an application for a fee patent

before he could exercise his statutory powers and (2) that the Secretary of the Interior did not make an individual determination of competency before issuing the fee patents. Each of these arguments is fallacious.

A. No application for a patent in fee is required under the Burke Act.

In analyzing this contention, the historical context must, of course, be considered. The period at issue is generally referred to as the Assimilationist Era and the Allotment Acts were preeminently a part of that Era. This Court has said of the Allotment Acts that their "policy . . . was the eventual assimilation of the Indian population . . . and the 'gradual extinction of Indian reservations and Indian titles.' . . . The Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was designed to eventually eliminate tribal

relations." Montana v. United States, 450 U.S. 544, 559-560, n. 9 (1981) (citations omitted).

The Burke Act exemplified this policy as the specific language and history of the Act demonstrates.

Reference must first be made to the text of the statute which does not contain a requirement for an application by the individual Indian. Instead, the statute allows the Secretary to issue a fee patent to an Indian "in his discretion." 25 U.S.C. S 349. Second, the legislative history indicates that the bill:

places the responsibility upon the Secretary of the Interior and the Indian Department, who know best when an Indian has reached such a stage of civilization to be able and capable of managing his own affairs.

H.R. No. 1558, 59th Cong., 1st Sess. (1906), p. 2. Statutory authority, simply stated,

was vested in the Secretary and not in the individual Indian.

Third, Congress clearly knew how to demand an application for a patent in fee when it wished to do so. Congress did use application language in seven acts contemporaneous with the Burke Act.<sup>1</sup> In contrast, there were at least three contemporaneous acts in which no application language was used.<sup>2</sup>

In this context the failure to use application language in the Burke Act

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<sup>1</sup>(1) Act of July 1, 1902, 32 Stat. 636, 639-640. (2) Act of April 21, 1904, 33 Stat. 189, 204. (3) Act of June 14, 1906, 34 Stat. 262, 263. (4) Act of June 21, 1906, 34 Stat. 325, 353. (5) Act of June 28, 1906, 34 Stat. 539, 542. (6) Act of May 29, 1908, 35 Stat. 444. (7) Act of June 25, 1910, 36 Stat. 855.

<sup>2</sup>(1) Act of June 21, 1906, 34 Stat. 325, 381. (2) Act of May 27, 1908, 35 Stat. 312. (3) Act of June 25, 1910, 36 Stat. 855-856, amended, Act of February 14, 1913, 37 Stat. 678.

strongly militates for a conclusion that such language should not be added, as the Petitioners in effect urge, by judicial fiat.

B. An individual determination of competency was made.

Petitioners assert that the grants of the patents in fee to Indians were not valid because there was no "individual determination of competency."

In 1917, the Commissioner of Indian Affairs promulgated a new standard known as the 1917 Declaration of Policy. 1917 Annual Report of the Commissioner of Indian Affairs (ARCIA), p. 4.<sup>3</sup>

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<sup>3</sup>The State of South Dakota has consistently argued that the 1917 Declaration of Policy constitutes a legislative rule and merits review as such a rule. See Boske v. Comingore, 177 U.S. 459 (1900); 1878 Revised Statutes SS 441, 463, 465 as codified at 43 U.S.C. S 1457(10); 25 U.S.C. S 2; 25 U.S.C. S 9. See also United States v. Thurston County, 143 F. 287, 291 (8th Cir. 1906).

The Declaration (which built on a 1916 action) retained the earlier requirement that competency be determined on an individual basis but used a more objective standard than had been employed earlier. The Declaration required that to show competency a person must be (1) able-bodied; (2) less than one-half Indian blood; and (3) twenty-one years of age. 1917 ARCIA, p. 4. Once these highly objective indicators were met, the fee patent would be issued, although exceptions would be made if the Indian were deemed "manifestly incompetent." 1917 ARCIA, p. 5. Thus competency was determined on the basis of an individual objective standard tempered by a provision which would overcome the standard in certain circumstances. There clearly was an individual determination of competency. As noted by Chief Judge Porter at the trial level,

Plaintiff argues, initially, that the Burke Act requires what plaintiff calls an "individual" determination of competency. Precisely what is meant by "individual" is not clear. Certainly, there was an "individual" finding that each allottee met the age and blood standards.

Bordeaux v. Hunt, 621 F.Supp. 637, 649-650 (D.S.D. 1985).

Petitioners also argue, as a related matter, that the use of blood quantum was improper as a part of the Secretary's standard. The Petitioners thus ignore this Court's decision in United States v. Waller, 243 U.S. 452 (1917), decided just days before the promulgation of the 1917 Declaration of Policy. In Waller this Court upheld a congressional distinction between full blood and mixed blood Indians, stating

The distinction between the qualifications of adult mixed and full-blood Indians is one which Congress has not infrequently applied.

243 U.S. at 462. The Court went on to say "It is not for the courts to question this legislative judgment."<sup>4</sup> Id. See also, United States v. First National Bank of Detroit, Minnesota, 234 U.S. 245 (1914); Tiger v. Western Investment Company, 221 U.S. 286 (1911).

An action of the Commissioner and the Secretary adopting a view harmonious with that of this Court should certainly not be struck down as improper seventy years after the action was taken.

## IV

BOTH 28 U.S.C. § 2401(a) AND 25  
U.S.C. § 347 BAR THIS ACTION  
AGAINST THE UNITED STATES.

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<sup>4</sup> See generally, Act of June 21, 1906, 34 Stat. 325, 353; Act of March 1, 1907, 34 Stat. 1034; Act of May 27, 1908, 35 Stat. 312. And see 25 CFR §§ 5.1(c), 20.1(n), 31.1(a), 152.5(c), 256.2(e)(3).

A. 28 U.S.C. § 2401 provides the statute of limitations in these cases.

28 U.S.C. § 2401(a) is the general six year statute of limitations governing actions against the United States. South Dakota contends that the statute ran long before the filing of these suits; because the United States is an indispensable party which cannot not be joined, the cases must be dismissed.

The Petitioners assert in response that 28 U.S.C. § 2401(a) may not be applied to the United States in this case, citing certain legislative history associated with the 1948 revision of the act. The Petitioners apparently claim that because Indian rights are at issue, the revision did not have any effect on them.

The Court of Appeals, however, rejected the Petitioners' reading of the legislative history. The Court of Appeals appropriately noted that the language of the statute is

"clear and definitive." 809 F.2d at 1327. The 1948 version of S 2401(a) read, in part, as follows:

Every civil action commenced against the United States shall be barred unless the complaint is filed within the six years after the right of action first accrues.

The 1978 revision added the language "[e]xcept as provided by the Contracts Dispute Act of 1978."

The language of the statute is certainly clear on its face and operates to bar these actions against the United States as untimely.

See also, Lewis v. Marshall, 30 U.S. (5 Peters) 470, 477-78, 8 L.Ed. 195 (1831) quoted at 809 F.2d 1327.

The Petitioners also argue that 28 U.S.C. S 2415 waives the time limit in S 2401(a).

However, because 28 U.S.C. S 2415 applies only to actions brought by the

federal government and this is an action against the federal government, and because it is inapplicable to suits to establish the title to property, 28 U.S.C. § 2415 is not determinative of this case. See Mottaz, 106 S.Ct. at 2232, n.10; Nichols, 809 F.2d at 1330-1331.

B. 25 U.S. § 347 provides authority for application of state statutes of limitations.

The Court of Appeals noted that a basis for the application of state statutes of limitations might be found in 25 U.S.C. § 347. See, Nichols, 809 F.2d at 1331. South Dakota strongly agrees with this suggestion. See, e.g., Little Bill v. Swanson, 117 P. 481 (Wash. 1911).

- C. The federal and state statutes of limitations have run even if it's assumed that the transaction granting the patents in fee were voidable or void.

Petitioners' arguments pivot on the assumption that transactions granting Indians title to their property in fee were void because they violated the Burke Act. South Dakota has vigorously responded that the transactions did not violate the statute.

In addition the State has argued that even if the transactions did violate the statute they were not void but merely voidable. The Court of Appeals would say at most that the patents in the cases before this Court were "possibly voidable." Nichols v. Rysavy, 809 F.2d 1317, 1330 (8th Cir. 1987). The distinction between void and voidable is well established. See United States v. Schurz, 102 U.S. (Otto) 378, 400-01, 26 L.Ed. 167 (1880). Moreover, the method of defeating a fee patent, assuming

voidability, is "by judicial proceedings to set it aside, or correct it if only partly wrong." Id. Because a suit was required to challenge the validity of these patents, the appropriate statute of limitations, i.e., 28 U.S.C. § 2401(a) was applicable and has run.

The Petitioners have argued, in essence, that the determination of the Court of Appeals with regard to voidness was wrong and that the transaction was void. They argue that no statute of limitations can run against a void patent.

In United States v. Mottaz, however, the Court reversed a ruling of a Court of Appeals that a case involving Indian land should be remanded because of the possibility that the transaction was void. By so doing, the Court rejected the view that a statute of limitations could not run against a void patent. It follows that the statute of limitations has long since run in this case

even assuming, arguendo, the voidness of the transactions at issue. See, Nichols, 809 F.2d at 1328-1330.

In sum, South Dakota argues that the Burke Act allowed the Secretary of the Interior to impose patents in fee without application and through use of a blood quantum standard. Even if the transactions were void or voidable, however, the pertinent statutes of limitations have run. There is no cause of action against the United States (or indeed against the private or state defendants) at this late date.

#### CONCLUSION

The commencement of this litigation has caused substantial unrest and uncertainty among people who have, in good faith, held land in fee for decades. The careful opinion of the Eighth Circuit Court of Appeals resolving these issues has fairly considered the claims of the Petitioners. This Court

should decline to grant certiorari to review  
the Eighth Circuit's decision.

Respectfully submitted,

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